operator," as that term is defined in the Communications Act.[373] Competitive MVPDs, as well as some cable MSOs,[374] argue that the prohibition is thus underinclusive because it does not pertain to certain non-cable-affiliated programming that is necessary for MVPDs to compete. They ask the Commission to prohibit exclusive contracts for (i) all "must have" programming networks, regardless of whether the network is affiliated with a cable operator;[375] and (ii) all programming networks vertically integrated with any MVPD, including DBS operators and new MVPDs such as AT&T and Verizon.[376]

76. As an initial matter, to the extent that an MVPD meets the definition of a "cable operator" under the Communications Act, the exclusive contract prohibition in Section 628(c)(2)(D) already applies to its affiliated programming and, thus, no further action is required on our part.[377] We have previously explained that the exclusive contract prohibition in Section 628(c)(2)(D) does not extend to unaffiliated programming networks and programming networks affiliated with non-cable MVPDs, such as DBS operators.[378]

77. Moreover, the record before us in this proceeding does not provide sufficient evidence upon which to conclude that non-cable-affiliated programming is being withheld from MVPDs to a significant extent or that such withholding is adversely impacting competition in the video distribution market. Accordingly, we seek comment on this issue in the *NPRM*. We agree with DIRECTV that the economic premise underlying the exclusive contract prohibition in Section 628(c)(2)(D) is that the cable industry's dominance of the video distribution market enables cable operators to successfully withhold affiliated programming from rival MVPDs in order to limit competition in the distribution market.[379] The record before us in this proceeding does not provide us with adequate evidence to conclude that those exclusive programming arrangements entered into by non-cable MVPDs have harmed competition in the video distribution market.[380] Because we have not been presented with sufficient evidence in this

[373] *See* 47 U.S.C. § 522(5) (defining a "cable operator"); *id.* § 522(7) (defining a "cable system"); *Definition of a Cable System*, 5 FCC Rcd 7638, 7638-39, ¶¶ 6-11 (1990).

[374] *See, e.g.*, Comcast Comments at 24 ("[T]o the extent that MVPDs cannot survive without access to certain programming, it is irrelevant whether that programming is 'affiliated;' what matters is whether that programming is 'must have' in order to compete."); *see also* Cablevision Comments at 27.

[375] *See* NCTA Comments at 4-5; RCN Comments at 12-18; SureWest Comments at 9; ACA Reply Comments at 7-8; RCN Reply Comments at 12-13; SureWest Reply Comments at 8-9.

[376] *See* ACA Comments at 2, 8-9, 11-13; ACA Reply Comments at 6-7; SureWest Reply Comments at 8.

[377] Moreover, as AT&T notes, Section 628(j) of the Communications Act provides that any provision of Section 628 that applies to a cable operator also applies to any common carrier or its affiliate that provides video programming. *See* 47 U.S.C. § 548(j); *see also* AT&T Reply Comments at 6 n.19.

[378] *See 2002 Extension Order*, 17 FCC Rcd at 12158, ¶ 74 ("The program access rules, including the exclusivity prohibition, apply only to satellite-delivered program services in which a cable operator has an attributable interest.").

[379] *See* DIRECTV Reply Comments at 3 ("Section 628's prohibition on exclusivity is specific for a reason. . . . Congress never considered exclusivity *per se* to be anticompetitive. Congress found, however, that, because cable operators possess market power, programmers affiliated with those cable operators could harm emerging competition by withholding affiliated programming from cable's rivals.") (footnotes omitted); *see also* Broadcast Networks Reply Comments at 3-4 ("[T]he program access rules are based on the narrow antitrust concern that a vertically-integrated programmer might withhold programming in order to prevent or hinder competition to that programmer's MVPD operations. It is axiomatic that this concern has always been and remains entirely non-existent for non-vertically integrated programming.") (footnotes omitted).

[380] The one example of an exclusive programming arrangement entered into by a competitive MVPD is DIRECTV's exclusive deals for certain national sports programming with the National Football League, college basketball, (continued....)

proceeding to consider a rule that prohibits exclusive contracts for non-cable-affiliated programming, we need not address here our statutory authority to apply an exclusive contract prohibition to such programming.[381]

(ii) Expanding the Prohibition to Terrestrially Delivered Programming

78. We decline to apply an exclusive contract prohibition to terrestrially delivered programming at this time. Some competitive MVPDs argue that the Commission should apply the exclusive contract prohibition to terrestrially delivered programming networks, citing various provisions of the Communications Act in addition to Section 628(c) for statutory support.[382] The exclusive contract prohibition in Section 628(c)(2)(D) pertains only to vertically integrated "satellite cable programming" and vertically integrated "satellite broadcast programming."[383] The Communications Act defines both terms to include only programming transmitted or retransmitted by satellite for reception by cable

(Continued from previous page)
Major League Baseball, and NASCAR. *See* ACA Comments at 9 n.17; RCN Comments at 17-18. Unlike in the case of cable operators (*see supra* ¶ 52), there is no evidence in the record to conclude that a competitive MVPD can make exclusivity a profitable strategy over the long term. Moreover, commenters have not provided any evidence of competitive harm resulting from their inability to offer this programming. Unlike in the case of cable-affiliated regional sports programming, we have no evidence that the inability to access this sports programming has impacted MVPD subscribership. *See supra* ¶ 39 (discussing impact on MVPD subscribership of inability to access cable-affiliated RSNs).

[381] Commenters cite provisions of the Communications Act other than Section 628(c)(2)(D) as providing the Commission with statutory support to apply an exclusive contract prohibition to non-cable-affiliated programming. *See* RCN Comments at 16-17 (citing Sections 4(i) and 628(b) of the Communications Act); SureWest Comments at 9 n.17 (referring to unspecified provisions of the Communications Act). We found no basis to consider DBS operators as "cable operators" as defined in Section 602 for purposes of the exclusive contract prohibition in Section 628(c)(2)(D), as requested by RCN. *See* RCN Comments at 17 n.48. As we have concluded previously, the definition of a "cable system" and a "cable operator" in the Communications Act does not include DBS. *See* 47 U.S.C. § 522(5) (defining a "cable operator"); *id.* § 522(7) (defining a "cable system"); *Definition of a Cable System*, 5 FCC Rcd at 7638-39, ¶¶ 6-11; *see also* DIRECTV Reply Comments at 5-6.

[382] *See* SureWest Comments at 7-8 (citing Section 4(i) of the Communications Act); Verizon Comments at 14 (same); *id.* at 14 (citing Section 303(r) of the Communications Act); SureWest Comments at 8 (citing Section 601(6) of the Communications Act); RICA Comments at 5 (citing Section 612(g) of the Communications Act); *id.* at 5 (citing Section 616(a) of the Communications Act); SureWest Comments at 7 (citing Section 628(b) of the Communications Act); *see also* AT&T Comments at 9 n.24; BSPA Comments at 16-18; EchoStar Comments at 4. The Commission previously declined to address arguments regarding the Commission's statutory authority to address terrestrially delivered programming under Sections 4(i) and 303(r) of the Communications Act. *See 1998 Program Access Order*, 13 FCC Rcd at 15856, ¶ 71 n.222. The Commission has also stated that "given that 628 does not by its terms apply to terrestrially-delivered programming, it is not appropriate for the Commission to exercise ancillary jurisdiction to extend, in the context of a complaint proceeding, program access regulation to terrestrially-delivered programming." *RCN Telecom Services v. Cablevision Systems Corp.*, 16 FCC Rcd 12048, 12055, ¶ 18 (2001). The Commission has stated "there may be circumstances where moving programming from satellite to terrestrial delivery could be cognizable under Section 628(b) as an unfair method of competition or deceptive practice if it precluded competitive MVPDs from providing satellite cable programming." *Id.* at 12053, ¶ 15; *DIRECTV*, 15 FCC Rcd at 22807; *Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems*, 11 FCC Rcd 18223, 18325, ¶ 197 n.451 (1996) ("we do not foreclose a challenge under Section 628(b) to conduct that involves moving satellite delivered programming to terrestrial distribution in order to evade application of the program access rules and having to deal with competing MVPDs").

[383] 47 U.S.C. § 548(c)(2)(D).

operators.[384] Based on these definitions as well as the legislative history of the 1992 Cable Act, the Commission has previously concluded that terrestrially delivered programming (such as programming delivered by programmers to cable operators by fiber) is "outside of the direct coverage" of the exclusive contract prohibition in Section 628(c)(2)(D).[385] As we have concluded previously, we decline to apply the exclusive contract prohibition to terrestrially delivered programming pursuant to Section 628(c)(2)(D).[386] Commenters have failed to provide any new evidence or arguments that would lead us to reconsider our previous conclusion that terrestrially delivered programming is "outside of the direct coverage" of Section 628(c)(2)(D).[387] We continue to believe that the plain language of the definitions of "satellite cable programming" and "satellite broadcast programming" as well as the legislative history of the 1992 Cable Act place terrestrially delivered programming beyond the scope of Section 628(c)(2)(D).[388] In the *NPRM*, we seek further comment on whether other provisions of the Communications Act provide the Commission with statutory authority to extend our program access rules, including an exclusive contract prohibition, to terrestrially delivered programming, and whether we should extend the prohibition to cover such programming.[389]

5. Length of New Term

79. We conclude that the exclusive contract prohibition will be extended for five years subject to review during the last year of this extension period (*i.e.*, between October 2011 and October 2012). As we concluded in the *2002 Extension Order*, we do not believe that establishing a fixed date for sunset of the exclusive contract prohibition without further review will serve the public interest. Section 628(c)(5) does not expressly state a term for how long the prohibition should continue if we decide that it should be extended, thereby providing the Commission with the discretion to prescribe this period.[390] In the *2002 Extension Order*, the Commission stated that establishing a fixed date for sunset of the prohibition without conducting a further proceeding to determine whether the prohibition is still "necessary to preserve and protect competition and diversity in the distribution of video programming" is not consistent with Congressional intent.[391] We cannot predict now how future changes in the video distribution market will impact the continued need for the exclusive contract prohibition. Rather, we

[384] The term "satellite cable programming" means "video programming which is transmitted via satellite and which is primarily intended for direct receipt by cable operators for their retransmission to cable subscribers," except that such term does not include satellite broadcast programming. 47 U.S.C. § 548(i)(1); 47 U.S.C. § 605(d)(1); *see also* 47 C.F.R. § 76.1000(h). The term "satellite broadcast programming" means "broadcast video programming when such programming is retransmitted by satellite and the entity retransmitting such programming is not the broadcaster or an entity performing such retransmission on behalf of and with the specific consent of the broadcaster." 47 U.S.C. § 548(i)(3); *see also* C.F.R. § 76.1000(f).

[385] *See DIRECTV, Inc. v. Comcast Corp. et al.*, 15 FCC Rcd 22802, 22807, ¶ 12 (2000); *see also 2002 Extension Order*, 17 FCC Rcd at 12158, ¶ 73.

[386] *See 2002 Extension Order*, 17 FCC Rcd at 12158, ¶ 73; *DIRECTV, Inc.*, 15 FCC Rcd at 22807, ¶ 12; *1998 Program Access Order*, 13 FCC Rcd at 15856, ¶ 71; *see also* AT&T Comments at 9 n.24; SureWest Comments at 7-8; SureWest Reply Comments at 6-8.

[387] *DIRECTV, Inc.*, 15 FCC Rcd at 22807, ¶ 12; *see* Comcast Reply Comments at 29-30.

[388] *See 2002 Extension Order*, 17 FCC Rcd at 12158, ¶ 73.

[389] *See infra* Section IV.B.

[390] *See 2002 Extension Order*, 17 FCC Rcd at 12159-60, ¶ 77.

[391] *See id.* at 12160, ¶ 78; *see also* AT&T Reply Comments at 13 n.50; EchoStar Reply Comments at 13 n.22.

believe that providing for a limited extension subject to further review is a more prudent approach and comports better with Congressional intent than a predetermined sunset date.

80. In the *Notice*, we sought comment on whether the exclusive contract prohibition should automatically sunset upon a specific event or events in the marketplace.[392] Commenters argue that the exclusive contract prohibition should not sunset upon the materialization of specific marketplace events.[393] OPASTCO/ITTA argues that technological developments and marketplace evolutions are occurring too frequently for the Commission to predict when the rule should sunset without a thorough review.[394] We agree that the evolving nature of the video distribution and programming markets makes it difficult if not impossible to determine in this proceeding what specific marketplace events would demonstrate that competition in the MVPD market is sufficient such that the exclusive contract prohibition can sunset. We note that commenters have not provided adequate suggestions as to such marketplace events. As discussed above, we believe that a more appropriate approach that is supported by Congressional intent is to continue to assess the developments in the video distribution and programming markets to determine if the market has evolved in a way that would allow us to abolish the exclusive contract prohibition.

81. As the Commission concluded in the *2002 Extension Order*, we will review whether the exclusive contract prohibition remains necessary during the last year of the five-year extension. We believe that five years could be a sufficient amount of time for competition to develop in the video distribution and programming markets.[395] Given the marketplace developments over the last five years, such as the emergence of telephone companies into the video distribution market as well as other pro-competitive trends, including an increase in the number of programming networks, a decrease in the percentage of popular national and regional networks that are vertically integrated with cable operators, and an increase in the market penetration of MVPDs that compete with incumbent cable operators, we conclude that this review of the continuing necessity of the exclusivity prohibition has been a useful exercise of Commission resources. Accordingly, we believe that five years is an appropriate period of time to revisit the exclusivity prohibition. We also emphasize that, if adequate competition emerges before five years, the Commission could initiate its review earlier either on its own motion or in response to a petition.[396] Moreover, we will continue to evaluate petitions for exclusivity under the public interest factors established by Congress.[397]

6. Other Programming Issues

82. Small and rural telephone MVPDs raise additional concerns in their comments regarding the difficulties they face in trying to obtain access to programming, such as tying of desired with undesired programming and unwarranted security requirements.[398] We find that these concerns are

[392] *See Notice*, 22 FCC Rcd at 4258, ¶ 11.

[393] *See* EATEL Video Comments at 5; OPASTCO/ITTA Comments at 3-5; SureWest Comments at 2-4.

[394] *See* OPASTCO/ITTA Comments at 5.

[395] A five-year extension was supported by a wide-range of competitive MVPDs and consumer groups. *See* AT&T Comments at 5; BSPA Comments at 4; CA2C Comments at ii-iii, 2; DIRECTV Comments at 12; EATEL Video Comments at 5; EchoStar Comments at 10; NTCA Comments at 3; OPASTCO/ITTA Comments at 3-5; RICA Comments at 3; SureWest Comments at 2-4; Consumer Groups Reply Comments at 7.

[396] *See 2002 Extension Order*, 17 FCC Rcd at 12126, ¶ 5.

[397] *See* 47 U.S.C. § 548(c)(4); 47 C.F.R. § 76.1002(c)(4).

[398] *See* NTCA Comments at 6-8; OPASTCO/ITTA Comments at 5-8.

beyond the scope of the programming issues raised in the *Notice*, which pertained only to the prohibition on exclusive contracts for satellite-delivered vertically integrated programming under Section 628(c)(2)(D) and the extension of that prohibition pursuant to Section 628(c)(5).[399] We did not seek comment on these issues in the *Notice* and, accordingly, do not have a sufficient record upon which to address these concerns in this *Order*. We seek further comment on these issues in the *NPRM*.

B. Modification of Program Access Complaint Procedures

83. As discussed below, we revise our program access complaint procedures. Specifically, we codify the existing requirement that respondents to program access complaints must attach to their answers copies of any documents that they rely on in their defense; find that in the context of a complaint proceeding, it would be unreasonable for a respondent not to produce all the documents requested by the complainant or ordered by the Commission, provided that such documents are in its control and relevant to the dispute; codify the Commission's authority to issue default orders granting a complaint if a respondent fails to comply with discovery requests; and allow parties to choose, within 20 days of the close of the pleading cycle, to engage in voluntary commercial arbitration of their program access complaints.

84. In the *Notice*, the Commission sought comment on whether and how the procedures for resolving program access disputes under Section 628 should be modified.[400] In general, Comcast, NCTA, and Time Warner, as well as the Broadcast Networks, argue that changes to the Commission's program access complaint procedures are not necessary.[401] Comcast asserts that the Commission has carefully designed the program access procedural rules to provide effective relief by placing the least evidentiary burdens on those seeking relief and ensuring a speedy resolution of complaints; and that proposed changes to the process will make the program access complaint process more complicated, more costly, and more time-consuming.[402] NCTA asserts that most program access complaints have been disposed of relatively quickly or resulted in settlements.[403] Time Warner asserts that the appropriate way to resolve carriage disputes is for the parties to hash out their differences at the bargaining table, and the Commission should retain its existing policies and procedures, which encourage such negotiations.[404] Time Warner argues that expanding the program access rules would be inconsistent with the norm of relying on the marketplace to govern contracts between private parties.[405] Time Warner asserts that because the rules apply to only a very small number of program networks, these networks are forced to face a burdensome regulatory regime not encountered by the vast majority of their program network competitors.[406] The Broadcast Networks also opposes changes to the process.[407]

---

[399] *See Notice*, 22 FCC Rcd at 4258, ¶ 12 ("we seek comment on any other issues appropriate to our inquiry in accordance with Section 628(c)(5)").

[400] *See Notice*, 22 FCC Rcd at 4259-4260, ¶¶ 13-16.

[401] *See* Comcast Comments at 26-28; Broadcast Networks Reply Comments at 3; NCTA Reply Comments at 10; Time Warner Reply Comments at 5.

[402] *See* Comcast Comments at 26-28.

[403] *See* NCTA Comments at 9.

[404] *See* Time Warner Reply Comments at 2.

[405] *See id.* at 5.

[406] *Id.*

[407] *See* Broadcast Networks Reply Comments at 3.

85. Parties recommending changes to the rules urge the Commission to focus on three areas of reform: acceleration of the deliberative process; providing a workable discovery mechanism; and protecting consumers during the pendency of complaint proceedings.[408] OPASTCO/ITAA argues that the current process is so costly and time-consuming that it is impracticable for rural carriers to pursue a program access complaint.[409] NTCA states that small rural carriers are at a disadvantage under the current procedures.[410] EchoStar relies on its own experience to conclude that the current process does not provide an effective regulatory backstop to protect against protracted negotiations that can result in loss of subscribers and significant financial uncertainty for competitive MVPDs.[411] In addition, EchoStar argues that the current procedures fail to provide a reliable means to ensure that all relevant documentation is available to Commission staff and the parties.[412] AT&T urges reforms to make Section 628 a more effective deterrent to anticompetitive conduct by cable incumbents.[413] Specifically, parties wishing to change the current process raise five issues: the length of the pleading cycle; discovery options; the parties' status pending resolution of complaints; time limits for resolving complaints; and arbitration as an alternate route to filing a complaint. We address all these issues below with the exception of the parties' status pending complaint resolution, which we address in the *NPRM*.

1. Pleading Cycle

86. In this *Order*, we retain our existing pleading cycle. The Commission's existing rules provide that an MVPD aggrieved by conduct that it believes constitutes a violation of Section 628 and the Commission's program access rules may file a complaint with the Commission.[414] A complainant must first notify the programming vendor that it intends to file the complaint and allow the vendor 10 days to respond.[415] Once a complaint is filed, the cable operator or satellite programming vendor must answer within 20 days of service of the complaint.[416] Replies to the answer are due within 15 days of service of the answer.[417]

87. EchoStar asserts that a tighter pleading cycle will be more conducive to an efficient resolution of complaints.[418] It suggests a 10-day limit for filing an answer and a 5-day reply period.[419] It recommends that all service be electronic and that weekly status conferences be held to ensure progress.[420] AT&T suggests that the Commission apply its existing formal complaint process to program

[408] *See* EchoStar Comments at 30.

[409] *See* OPASTCO/ITAA Comments at 8.

[410] *See* NTCA Comments at 6.

[411] *See* EchoStar Comments at 13.

[412] *See id.* at 14.

[413] *See* AT&T Reply Comments at 2.

[414] *See* 47 C.F.R. §§ 76.7 and 76.1003.

[415] 47 C.F.R. § 76.1003(b).

[416] 47 C.F.R. § 76.7(b)(2)(ii); 47 C.F.R. § 76.1003(a).

[417] 47 C.F.R. § 76.7(c)(3); 47 C.F.R. § 76.1003(a).

[418] *See* EchoStar Comments at 25.

[419] *See id.*

[420] *See id.*

access complaints and delegate resolution to the Enforcement Bureau.[421] NCTA opposes a more expeditious pleading cycle because the cycle is already among the shortest time frames in Commission regulation.[422] NCTA argues that reducing the timing of the pleading cycle further would not materially affect the overall time frame for resolving disputes, and would impose additional hardship on respondents.[423]

88. The original program access complaint pleading cycle called for a 30-day response time and 20-day reply window. In the *1998 Program Access Order*, the Commission adopted a more streamlined pleading cycle and reduced those times to 20 and 15 days respectively. The Commission's rules generally require answers to complaints to "advise the parties and the Commission fully and completely of the nature of any and all defenses" and "respond specifically to all material allegations of the complaint" or risk being deemed in default and having the complaint granted.[424] In addition, answers to program access complaints must contain specific information pertinent to the type of complaint, whether it is an exclusivity complaint, a discrimination complaint, or a price discrimination complaint, and must include written documentary evidence.[425]

89. *Discussion.* We find that the existing 20-day response time is necessary to allow sufficient time for a respondent to provide a complete defense. We encourage resolution of program access complaints based on the pleadings.[426] A shorter pleading cycle would not necessarily improve the overall time for complaint resolution because incomplete or rushed responses could lead to the need for further pleadings and discovery. We therefore decline to adopt a more expedited pleading cycle. However, we believe that electronic filing may help improve the speed of resolution and, therefore, we will continue to study this issue internally to determine if it is technologically feasible to require electronic filing for program access complaints, which necessarily involve a number of confidential documents. Currently, parties may voluntarily submit electronic copies of their pleadings to staff via e-mail in order to expedite review.

90. Regarding mandatory weekly status conferences, the Commission currently has the authority to hold status conferences at any time and any party may request that a status conference be held.[427] We believe that this provides the necessary flexibility to conduct status conferences as frequently as needed and decline to modify this rule to require mandatory weekly status conferences. Finally, we decline to shift the burden of complaint resolution to the Enforcement Bureau. We believe that program

---

[421] *See* AT&T Comments at 30. As part of the 1996 Act, Congress enacted deadlines for the Commission's resolution of complaints alleging unreasonably discriminatory or otherwise unlawful conduct filed against telecommunications carriers subject to the requirements of the Communications Act. *See* 47 U.S.C. §§ 208(b)(1), 260(b), 271(d)(6)(B), and 275(c); *Implementation of the Telecommunications Act of 1996: Amendment of Rules Governing Procedures to be Followed When Formal Complaints are Filed Against Common Carriers, Report and Order*, 12 FCC Rcd 22497, 22499-04 (1997) ("*Formal Complaint Order*"). In the *Formal Complaint Order*, the Commission adopted new or amended standards and procedures related to the processing and resolution of formal complaints against common carriers, including pre-filing negotiation requirements, pleading cycles, discovery, status conferences, damages procedures, prima facie claims, and burdens of proof.

[422] *See* NCTA Comments at 9-10.

[423] *See id.* at 9-10.

[424] 47 C.F.R. § 76.7(b)(2).

[425] *See* 47 C.F.R. § 76.1003(e).

[426] *See First Report and Order*, 8 FCC Rcd at 3389-90, ¶ 75.

[427] *See* 47 C.F. R. § 76.8.

access complaints are more appropriately handled by Media Bureau staff with expertise on the issues involved in program access disputes.

2. Discovery

91. In this *Order*, after reviewing our discovery rules pertaining to program access disputes, we codify the existing requirement that respondents to program access complaints must attach to their answers copies of any documents that they rely on in their defense; find that in the context of a complaint proceeding, it would be unreasonable for a respondent not to produce all the documents either requested by the complainant or ordered by the Commission, provided that such documents are in its control and relevant to the dispute; and emphasize that the Commission will use its authority to issue default orders granting a complaint if a respondent fails to comply with its discovery requests. The respondent shall have the opportunity to object to any request for documents.[428] Such request shall be heard, and determination made, by the Commission. The respondent need not produce the disputed discovery material until the Commission has ruled on the discovery request.

92. Competitive MVPDs urge the Commission to revise the discovery rules applicable to program access complaint proceedings.[429] USTelecom argues for mandatory automatic disclosure of specific information in response to a complaint to ensure adequate factual information is available to resolve the complaint.[430] USTelecom urges the Commission to permit party-directed discovery on a case-by-case case basis and to craft case-specific confidentiality protections for sensitive information.[431] RCN proposes that programmers' carriage contracts be available, subject to confidential treatment, because such agreements are essential for determining whether the programmer is discriminating in price, terms, and conditions.[432] RCN argues that restrictive confidentiality and non-disclosure requirements prevent buyers from knowing whether the rates, terms, and conditions offered are consistent with those provided to affiliated MVPDs and competitors.[433] EchoStar argues for discovery that is simultaneous with the complaint that includes six carriage contracts, both affiliated and unaffiliated, with discovery disputes resolved within ten days.[434] EchoStar also urges the Commission to incorporate the discovery mechanism used in common carrier complaint proceedings.[435]

93. According to CA2C, while the Commission may have been seeking to prevent excessive discovery cost and delay in establishing its current rules, the result has been that key documents are not made available in complaint proceedings, including programming contracts with competitors that are necessary to show *prima facie* discrimination.[436] CA2C and BSPA urge the Commission to make clear that respondents to discrimination complaints must produce these contracts, subject to confidential treatment.[437] These parties also request that the Commission make clear that staff may order discovery, in

[428] *See infra* ¶¶ 95, 98.

[429] *See* AT&T Comments at 30-32; CA2C Comments at 22-24.

[430] *See* USTelecom Comments at 20.

[431] *See id.*

[432] *See* RCN Comments at 20.

[433] *See id.*

[434] *See* EchoStar Comments at 27.

[435] *See id.* (*citing* 47 C.F.R. § 1.729).

[436] *See* CA2C Comments at 23.

[437] *See id.* (*citing* 47 C.F.R. § 76.9); BSPA Comments at 7.

consultation with or at the request of the parties, in order to facilitate resolution of the case.[438] AT&T asserts that the Commission should apply its procedures for adjudicating formal complaints to program access disputes, including rules governing pleading, discovery, and motions.[439] AT&T asserts that respondents should submit copies of all contracts and documents relevant to the complaint, subject to a codified and standardized protective order.[440] The Consumer Groups also supports additional tools for discovery.[441]

94. Comcast, NCTA, and Time Warner see no need for changes to the discovery rules.[442] NCTA argues that the proposed changes would automatically force programmers to disclose highly confidential and proprietary information and that the Commission considered and rejected similar suggestions in 1998 when it affirmed the use of Commission-controlled discovery.[443] Time Warner asserts that EchoStar's proposal to require a programmer to submit six carriage contracts for comparison with the complainant's contract would allow MVPDs to engage in "fishing expeditions" for highly confidential and competitively sensitive information and would give them substantially increased and unfair leverage in their negotiations with programmers.[444] Time Warner argues that the current rules permit discovery where warranted and that expanded discovery would create a procedural quagmire due to the complex nature of programming contracts.[445] Time Warner asserts that protective orders do not adequately eliminate the potential for harm from disclosure of confidential information.[446]

95. *Discussion.* We take measures to ensure that the Commission has the information necessary to expeditiously resolve program access complaints. In this regard, we take two actions: 1) we codify the requirement that a respondent must attach to its answer all documents that it expressly references or relies upon in defending a program access claim; and 2) we find that in the context of a complaint proceeding, it would be unreasonable for a respondent not to produce all the documents either requested by the complainant or ordered by the Commission, provided that such documents are in its control and relevant to the dispute. The respondent shall have the opportunity to object to any request for documents that are not in its control or relevant to the dispute. Such request shall be heard, and determination made, by the Commission. Until the objection is ruled upon, the obligation to produce the disputed material is suspended. Any party who fails to timely provide discovery requested by the opposing party to which it has not raised an objection as described above may be deemed in default and an order may be entered in accordance with the allegations contained in the complaint, or the complaint may be dismissed with prejudice.

96. *Respondent's Answer.* In the *1998 Program Access Order*, the Commission clarified that, to the extent that a respondent expressly references and relies upon a document or documents in defending a program access claim, the respondent must attach that document or documents to its

[438] *See* CA2C Comments at 24; BSPA Comments at 7.

[439] *See* AT&T Comments at 30 (*citing* 47 C.F.R. § 1.70, *et seq.*).

[440] *See id.* at 30-32.

[441] *See* Consumer Groups Reply Comments at 8.

[442] *See* Comcast Reply Comments at 36; NCTA Reply Comments at 10, Time Warner Reply Comments at 7.

[443] *See* NCTA Reply Comments at 11.

[444] *See* Time Warner Reply Comments at 3.

[445] *See id.* at 4.

[446] *See id.* at 12.

answer.[447] In this *Order*, we expressly codify that requirement in the Commission's rules.[448] To the extent that there has been any confusion about this requirement in the past, we clarify that a respondent must attach the necessary documentation to its answer to a program access complaint, subject to our rules on confidential filings. Subsequent to the *1998 Program Access Order*, the Commission, in the *1998 Biennial Review*, further clarified the response requirements for specific types of program access complaints.[449] To the extent that a respondent fails to include the permissive attachments identified in our rules that are necessary to a resolution of the complaint, the Commission may require the production of further documents.[450] Moreover, a program access complainant is entitled, either as part of its complaint or through a motion filed after the respondent's answer is submitted, to request that Commission staff order discovery of any evidence necessary to prove its case.[451] Respondents are also free to request discovery.

97. *Submission of Necessary Information.* We believe that expanded discovery will improve the quality and efficiency of the Commission's resolution of program access complaints. Accordingly, we find that it would be unreasonable for a respondent not to produce all the documents either requested by the complainant or ordered by the Commission,[452] provided that such documents are in its control and relevant to the dispute. In reaching this finding, we agree with the assertions of RCN and other competitors that the availability of programmers' carriage contracts, subject to confidential treatment, are essential for determining whether the programmer is discriminating in price, terms, and conditions. The Commission's rules allow the Commission staff to order production of any documents necessary to the resolution of a program access complaint, including documents upon which a complainant must rely to make its *prima facie* case.[453] The subject discovery may require the production of confidential material, including the disclosure of carriage contracts, subject to our confidentiality rules. While we retain this process for the Commission to order the production of documents and other discovery, we will also allow parties to a program access complaint to serve requests for discovery directly on opposing parties.[454]

98. Parties to a program access complaint may serve requests for discovery directly on opposing parties, and file a copy of the request with the Commission. As discussed above, the respondent shall have the opportunity to object to any request for documents that are not in its control or relevant to the dispute. Such request shall be heard, and determination made, by the Commission. Until the objection is ruled upon, the obligation to produce the disputed material is suspended. Any party who fails to timely provide discovery requested by the opposing party to which it has not raised an objection as described above may be deemed in default and an order may be entered in accordance with the allegations contained in the complaint, or the complaint may be dismissed with prejudice.[455]

---

[447] *See 1998 Program Access Order*, 13 FCC Rcd at 15849-50, ¶ 56.

[448] *See* Appendix D, § 76.1003(e).

[449] *1998 Biennial Review*, 14 FCC Rcd at 438, Appendix A, ¶ 9 (modifications to § 76.1003); *see* 47 C.F.R. § 76.1003(e).

[450] *See* 47 C.F.R. § 76.1003(e); 47 C.F.R. § 76.7(e)(2).

[451] *See* 47 C.F.R. § 76.7(e), (f).

[452] Indeed, in such circumstances, failure to produce the subject documents would also be a violation of a Commission order.

[453] *See* 47 C.F.R. § 76.7(e), (f).

[454] *See* Appendix D, § 76.1003(j).

[455] *Id.*

99. We reiterate that respondents to program access complaints must produce in a timely manner, the contracts and other documentation that are necessary to resolve the complaint, subject to confidential treatment.[456] In order to prevent abuse, the Commission will strictly enforce its default rules against respondents who do not answer complaints thoroughly or do not respond in a timely manner to permissible discovery requests with the necessary documentation attached.[457] Respondents that do not respond in a timely manner to all discovery ordered by the Commission will risk penalties, including having the complaint against them granted by default.[458] Likewise, a complainant that fails to respond promptly to a Commission order regarding discovery will risk having its complaint dismissed with prejudice.[459] Finally, a party that fails to respond promptly to a request for discovery to which it has not raised a proper objection will be subject to these sanctions as well.[460]

100. *Confidential Material.* We understand that this approach requires the submission of confidential and extremely competitively-sensitive information.[461] Accordingly, in order to appropriately safeguard this confidential information we believe it is necessary to revise the standard protective order and declaration ("Protective Order") for use in program access proceedings.[462] The Protective Order sets out the methodology for producing and protecting pleading or discovery material that is deemed by the submitting party to contain confidential information.[463] The Protective Order states that, once the authorized representative of the reviewing party has signed the appropriate declaration, the submitting party *shall* provide a copy of the confidential information to authorized representatives upon request.[464] Authorized representatives of reviewing parties are limited to counsel and their associated attorneys, paralegals, clerical staff and other employees, to the extent reasonably necessary to render professional services; specified persons, including employees of the reviewing parties, requested by counsel to furnish technical or other expert advice or service, or otherwise engaged to prepare material for the express purpose of formulating filings in the program access proceeding, *other than persons in a position to use the confidential information for competitive commercial or business purposes*; and any person designated

[456] *See* 47 C.F.R. § 76.9.

[457] *See* Appendix D, § 76.1003(j).

[458] *Id.*

[459] *Id.*

[460] *Id.*

[461] *See, e.g.*, 47 C.F.R. § 0.457(d)(iv) (treating as presumptively privileged and confidential "programming contracts between programmers and multichannel video programming distributors"). In this regard, we note that in a recent program access dispute, the Media Bureau expeditiously granted a complainant's request for discovery and issued a protective order to safeguard the highly confidential discovery subject matter. *See EchoStar Satellite L.L.C. v. Home Box Office, Inc.*, CSR 7070-P (filed Nov. 15, 2006).

[462] *See 1998 Program Access Order*, 13 FCC Rcd at 15865. The Protective Order is intended to facilitate and expedite review of documents containing privileged or confidential trade secrets and commercial or financial information. *Id.*

[463] *Id.* at 15865-69, ¶ 3. Confidential information is information submitted to the Commission which the submitting party has determined in good faith (i) constitutes trade secrets and commercial or financial information which is privileged or confidential within the meaning of Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4); and (ii) falls within the terms of Commission orders designating the items for treatment as confidential information. *Id.* at 15865, ¶ 1(c). The Commission may determine that all or part of the information claimed as confidential information is not entitled to such treatment. *See also* 47 C.F.R. § 76.9 (general procedures for protecting confidentiality of information).

[464] *1998 Program Access Order*, 13 FCC Rcd at 15867, ¶ 9.

by the Commission in the public interest, upon such terms as the Commission may deem proper.[465] Confidential information shall not be used for competitive business purposes, and shall not be used or disclosed except in accordance with the Protective Order.[466]

101. To ensure that confidential information is not improperly used for competitive business purposes, we intend to make an important revision to the Protective Order. Specifically, we revise it to reflect that any personnel, including in-house counsel, involved in competitive decision-making are prohibited from accessing the confidential information. We more specifically define the limitations on access by including language that the Commission routinely uses in the merger protective orders.[467] The Protective Order currently prohibits access to confidential information by specified persons that are in a position to use the information for competitive commercial or business purposes. We modify the language of the Protective Order to reflect that any counsel, or other persons, including in-house counsel, that are involved in competitive decision-making are prohibited from access to confidential material. We further define competitive decision-making to include any activities, association, or relationship with any person, including the complainant, client, or any authorized representative, that involves rendering advice or participation in *any* or all of said person's business decisions that are or will be made in light of similar or corresponding information about a competitor.[468]

[465] *Id.* at 15867, ¶ 7. Before an authorized representative may obtain access to confidential information, he or she must execute a declaration which states that under penalty of perjury he or she has agreed to be bound by the Protective Order. *Id.* at 15866, ¶¶ 5, 6 and at 15870. The declaration states that the reviewing party shall not disclose the confidential information to anyone except in accordance with the terms of the Protective Order and that the confidential information shall be used only for purposes of the program access proceeding. *Id.*

[466] *Id.* at 15867, ¶ 11.

[467] *See, e.g., News Corporation and the DirecTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, For Authority to Transfer Control*, Protective Order, 2007 WL 1482032 (MB, rel. May 21, 2007).

[468] *Id.* The terminology we insert today concerning activities, associations or relationships that involve rendering advice or participation in business decisions that are or will be "made in light of similar or corresponding information about a competitor" has been standard language used in our merger protective orders. *See Worldcom, Inc. and MCI Communications Corp. Transfer of Control*, 13 FCC Rcd 11166, 11168 (1998). Our definition of "competitive decision-making" as such is consistent with federal court cases. *See, e.g., U.S. Steel Corp. v. United States*, 730 F.2d 1465, 1468 n.3 (Fed. Cir. 1984) (noting that the "competitive decision-making" is a shorthand for a counsel's activities, association, and relationship with a client that are such as to involve counsel's advice and participation in any or all of the client's decisions ... made in light of similar or corresponding information about a competitor); *see also Brown Bag Software v. Symantec Corp.* 960 F.2d 1465, 1470 (9th Cir. 1992), *cert. denied* 506 U.S. 869 (1992) (defining "competitive decision-making" as advising on decisions about pricing or design made in light of similar or corresponding information about a competitor). This terminology was more recently discussed in *Intervet, Inc. v. Merial Ltd.*, 241 F.R.D. 55 (D.D.C. 2007) as follows: "Thus, U.S. Steel would preclude access to information to anyone who was positioned to advise the client as to business decisions that the client would make regarding, for example, pricing, marketing, or design issues when that party granted access has seen how a competitor has made those decisions. E.g., *Brown Bag Software*, 960 F.2d at 1471 (counsel could not be expected to advise client without disclosing what he knew when he saw competitors' trade secrets as to those very topics); *Matsushita Elec. Indus. Co v. United States*, 929 F.2d 1577, 1579-80 (Fed.Cir. 1991) (determination by agency forbidding access was arbitrary when lawyer precluded from access testified that he was not involved in pricing, technical design, selection of vendors, purchasing and marketing strategies); *Volvo Penta of the Americas, Inc. v. Brunswick Corp.*, 187 F.R.D. 240, 242 (E.D.Va. 1999) (competitive decision-making involves decisions "that affect contracts, marketing, employment, pricing, product design" and other decisions made in light of similar or corresponding information about a competitor); *Glaxo Inc. v. Genpharm Pharm., Inc.*, 796 F.Supp. 872, 876 (E.D.N.C. 1992) (improper to preclude in-house counsel from access to confidential information because he gave no (continued....)

102. In order to appropriately safeguard confidential information, we revise the Protective Order for use in program access proceedings to find that any personnel, including in-house counsel, (i) that are involved in competitive decision-making, (ii) are in a position to use the confidential information for competitive commercial or business purposes, or (iii) whose activities, association, or relationship with the complainant, client, or any authorized representative involve rendering advice or participation in any or all of said person's business decisions that are or will be made in light of similar or corresponding information about a competitor, are prohibited from accessing the confidential information.[469]

103. A protective order constitutes both an order of the Commission and an agreement between the party executing the declaration and the submitting party. The Commission has full authority to fashion appropriate sanctions for violations of its protective orders, including but not limited to suspension or disbarment of attorneys from practice before the Commission, forfeitures, cease and desist orders, and denial of further access to confidential information in Commission proceedings. We intend to vigorously enforce any transgressions of the provisions of our protective orders.[470]

3. Time Frame for Resolving Program Access Complaints

104. In this *Order*, we retain our current goals for resolving program access complaints with the intent to expedite complaints filed by small companies without existing carriage contracts. Under the current process, the Commission has set forth goals for the resolution of program access complaints as five months from the submission of a complaint for denial of programming cases, and nine months for all other program access complaints, such as price discrimination cases.[471] Competitive MVPDs believe that the Commission should establish a firm deadline by which program access complaints must be resolved.[472] OPASTCO/ITTA claim that the current process is so time consuming and costly that rural carriers forgo filing complaints and they urge the Commission to establish procedures that will provide for timely resolution of complaints.[473] ACA and the Consumer Groups also support mandatory time frames for complaint resolution. Verizon urges the Commission to establish a firm deadline of five months by which all complaints should be resolved.[474] USTelecom suggests three months for denial of programming cases and six months for all other complaints.[475] NTCA urges that a firm rather than suggested deadline be established. EchoStar argues for a 45-day "shot clock" deadline with a one-time 45-day extension for complex cases.[476]

105. CA2C advocates a 120-day time frame for all cases, beginning with the close of pleadings.[477] The SBA Office of Advocacy and BSPA support this time frame.[478] CA2C suggests,

(Continued from previous page)
advice to his client about competitive decisions such as pricing, scientific research, sales, or marketing)." *Id.* at 57-58.

[469] *See* Appendix E, Standard Protective Order and Declaration for Use in Section 628 Program Access Proceedings.

[470] *See* Appendix D, § 76.1003(k).

[471] *See 1998 Program Access Order*, 13 FCC Rcd at 15842-43, ¶ 41.

[472] *See* AT&T Comments at 27-29; CA2C Comments at 22; Verizon Comments at 13-14.

[473] *See* OPASTCO/ITTA Comments at 8.

[474] *See* Verizon Comments at 16.

[475] *See* USTelecom Comments at 21.

[476] *See* EchoStar Comments at 25.

[477] *See* CA2C Comments at 22. We note that CA2C's 120-day time limit beginning at the end of the pleading cycle is no shorter than the Commission's current time frame for resolving routine program access complaints.

however, that the time limit be suspended to facilitate settlement negotiations.[479] CA2C asserts that, rather than complaints being resolved in the five- to nine-month time frame envisioned in the *1998 Program Access Order*, complaints often take years to resolve, which has a disparate impact on new entrants, through prolonged delays in a competitor's ability to carry must have programming pending resolution of denial of carriage complaints.[480] CA2C also asserts that the existing time frames have a negative impact on existing competitive providers, by imposing the continued payment of discriminatory prices over a prolonged period of time in price discrimination cases, and forcing competitors to divert inordinate resources to prosecution of program access complaints.[481]

106. AT&T asserts that delays in processing a complaint can cripple the ability of a new entrant to attract new subscribers and tarnish public perception of a new entrant's video offering during a critical period when consumers are forming initial impressions of that offering.[482] AT&T argues that the Commission should adopt a 90-day binding deadline for complaint resolution, consistent with the 90-day deadline for Section 271 complaints.[483] NCTA states that it does not oppose a more expedited time frame for Commission resolution of complaints, so long as cable operators and programmers are provided with sufficient time to respond to complaints.[484] Comcast does not object to the Commission firming up its deadlines for action on complaints.[485]

107. *Discussion.* We agree that program access complaints should be resolved in a timely manner, but the time frames for resolving complaints must be realistic. We will retain our goals of resolving program access complaints within five months from the submission of a complaint for denial of programming cases, and nine months for all other program access complaints, such as price discrimination cases. In the *1998 Program Access Order*, in imposing goals for the resolution of complaints, the Commission attempted to ascertain what can be accomplished on a consistent basis. The Commission found that a single time limit would require the Commission to adopt a longer time limit than would be necessary in many cases.[486] Consistent with the Commission's other statutory deadlines, the Commission adopted time frames that commenced from the time of the filing of a complaint. The Commission's designation of a five-month limit was consistent with the five-month period in which Congress required the Commission to resolve certain complaints against common carriers.[487] Other program access complaints, including price discrimination cases, were given a nine-month time frame for resolution, excluding the time necessary to resolve bifurcated damages issues.[488] The Commission determined that these were realistic goals, achievable given the Commission's limited resources and

(Continued from previous page)

[478] *See* BSPA Comments at 19; SBA Office of Advocacy Comments at 8.

[479] *See* CA2C Comments at 22.

[480] *See id.* at 21. CA2C offers no specific examples to establish that program access complaints often take years to resolve since adoption of the *1998 Program Access Order* time frames.

[481] *See id.* at 21.

[482] *See* AT&T Comments at 28.

[483] *See id.* at 29 (citing 47 U.S.C. § 271).

[484] *See* NCTA Comments at 14.

[485] *See* Comcast Reply Comments at 4.

[486] *See 1998 Program Access Order*, 13 FCC Rcd at 15842, ¶ 39.

[487] *See id.* at 15842, ¶ 41, n.121 (citing 47 U.S.C. §208(b)(1)); *see also Formal Complaint Order*, 12 FCC Rcd at 22499, n.4.

[488] *See 1998 Program Access Order*, 13 FCC Rcd at 15842, ¶ 41.

overall statutory duties. The Commission also provided for the suspension of the time limits upon motion by parties seeking to pursue settlement negotiations.[489]

108. We find that these time limits for resolution are still reasonable. We fail to see a direct correlation between a more expedited process for the resolution of program access complaints and lower litigation costs to complainants. Indeed, we believe that overly accelerated pleading and discovery time periods can lead to increased litigation costs if the parties are required to hire additional staff and counsel in attempting to meet unrealistic deadlines. However, we are concerned with delays in the resolution of complaints filed by new entrants, especially small businesses, and therefore, the Commission will expedite the resolution of such complaints and, as discussed above in Section III.B.2, will strictly enforce its default rules against respondents who do not answer complaints thoroughly with the necessary documentation attached.[490]

4. Arbitration

109. In this *Order*, we expand the use of voluntary arbitration for resolution of program access disputes, by increasing opportunities for parties to choose arbitration in lieu of Commission resolution of a pending complaint, and refrain from imposing a mandatory arbitration requirement at this time. Competitive MVPDs urge the Commission to implement arbitration measures into the program access complaint process. NTCA, OPASTCO/ITTA, and SureWest, as well as the SBA Office of Advocacy, all support some form of arbitration.[491] ACA, BSPA, EchoStar, and RCN, as well as Consumer Groups, all urge the adoption of "baseball-style" commercial arbitration rules, similar to those approved in connection with two recent mergers ("*Adelphia and Hughes Orders*").[492] BSPA believes that the arbitration rules adopted in the two merger cases are a good template for arbitration rules that the Commission should adopt as part of its program access rules. BSPA and RCN point out that the ultimate goal of establishing an arbitration option is to push the parties toward agreement prior to a complete breakdown in negotiations.[493] RCN points out that the rationale for adopting an arbitration remedy in the *Adelphia* and *Hughes* proceedings applies equally in this context because vertically integrated programmers have similar incentives to use temporary foreclosures during negotiations.[494] BSPA argues that there is precedent for the use of third parties to adjudicate disputes under the Communications Act.[495] EchoStar asserts that arbitration of program access complaints is consistent with all statutory

[489] *See id.* at 15843, ¶ 42.

[490] *See* 47 C.F.R. § 76.7(b)(2)(iii).

[491] *See* NTCA Comments at 6; OPASTCO/ITTA Comments at 8; SBA Office of Advocacy Comments at 8; SureWest Comments at 10.

[492] *See* BSPA Comments at 7 (*citing Adelphia Order; Hughes Order*); ACA Comments at 10 (same); EchoStar Comments at 18 (same); RCN Comments at 19 (same); Consumer Groups Reply Comments at 7 (same).

[493] *See* BSPA Comments at 8; RCN Comments at 19.

[494] *See* RCN Comments at 19.

[495] *See* BSPA Comments at 12-14 (citing *Improving Public Safety Communications in the 800 MHz Band, et al.*, 19 FCC Rcd 14969, 15070-71, 15074-75 and n.509 (2004); *Amendment of the Commission's Rules to Establish New Personal Communications Services*, 9 FCC Rcd 4957, 5037 (1994); *Amendment of the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation*, 11 FCC Rcd 8825 (1996)).

requirements, including the 1992 Cable Act, the Administrative Procedure Act,[496] and the Administrative Dispute Resolution Act of 1996,[497] as well as with the subdelegation doctrine.[498]

110. Comcast states that the Commission should not require arbitration of disputes.[499] Comcast asserts that Section 628 assigns the responsibility to adjudicate disputes to the Commission and there is no provision of law that authorizes the Commission to mandate binding arbitration.[500] NCTA asserts that mandatory arbitration would improperly delegate the Commission's responsibilities to an outside party or, if the Commission provides for *de novo* review of the arbitrator's decision, would add an extra, time-consuming layer to what is now an expeditious process.[501] NCTA states that establishing a mandatory commercial arbitration provision similar to those imposed in the *Adelphia* and *Hughes* proceedings would be neither lawful nor advisable.[502] NCTA points out that the Commission already has procedures in place that allow parties to agree to invoke alternative dispute resolution ("ADR") to resolve certain factual disputes in lieu of referral to an administrative law judge, consistent with the Commission's ADR policy which relies on ADR as a "purely voluntary" measure.[503] NCTA continues that Section 628 provides the Commission with no authority to adopt one-sided arbitration rules and a party cannot be involuntarily subjected to arbitration of these complaints.[504]

111. The Broadcast Networks urge the Commission to refrain from imposing binding arbitration as a catch-all solution, contending there is no problem in need of solution, the Commission already has sufficient and effective remedies in place to resolve program access disputes, and the overlay of an additional layer of process would serve to prolong the Commission's deliberative process.[505] Moreover, the Broadcast Networks argue that the Commission has no authority to delegate its statutory obligation to resolve program access complaints.[506] Time Warner urges the Commission to reject mandatory arbitration of program access complaints.[507] Time Warner argues that because arbitration is generally a matter of contract, and federal law prohibits an agency from requiring consent to arbitration in

---

[496] 5 U.S.C. § 551 *et seq.*

[497] *Id.* §§ 571-584.

[498] *See* EchoStar Comments at 20. Under subdelegation principles, agencies may refer matters outside the agency for fact-finding and the issuance of preliminary decisions, provided the decisions remain subject to final agency review. *See United States Telecom Ass'n v. FCC*, 359 F.3d 554, 565-68 (DC Cir. 2004), *cert. denied*, 125 S.Ct. 313, 316, 345 (2004). Providing for *de novo* review by the Commission of arbitration awards satisfies this requirement. *See National Park & Conservation Association v. Stanton*, 54 F. Supp. 2d 7, 18-19 (D.D.C. 1999) (rejecting as unlawful a procedure by which the agency "completely shift[ed] its responsibility" to an outside council and "retain[ed] virtually no final authority over the action -- or inaction -- of the Council").

[499] *See* Comcast Comments at 28.

[500] *See id.*

[501] NCTA Comments at 12-14.

[502] *Id.* at 11.

[503] *See* NCTA Reply Comments at 12 (*citing* Comcast Comments at 29); *Use of Alternative Dispute Resolution Procedures in Commission Proceedings and Proceedings in which the Commission is a Party*, 6 FCC Rcd 5669, 5670, ¶ 12 (1991).

[504] *See* NCTA Reply Comments at 13.

[505] *See* Broadcast Networks Reply Comments at 3-4.

[506] *See id.* at 4.

[507] *See* Time Warner Reply Comments at 4.

order to ensure that it is truly voluntary, a mandatory arbitration requirement would be *ultra vires* and unlawful.[508]

112. *Discussion*. We decline to impose mandatory arbitration as a rule in all program access cases at this time. We would like to see how arbitration of program access disputes, either through a merger condition or through voluntary arbitration, is working over time, to determine if modifications to the arbitration process are necessary prior to imposing a mandatory requirement on all parties to all program access complaints. Once there is a track record for arbitration of program access disputes, we will be able to determine which types of disputes lend themselves more readily to resolution by arbitration and which may be more judiciously resolved by the Commission in the first instance.

113. The current rules allow parties to voluntarily engage in ADR, including arbitration, in lieu of an administrative hearing.[509] However, we believe that parties to program access complaints should be able to voluntarily choose arbitration prior to the Commission making a determination to forward the complaint to an administrative law judge and that the *Adelphia Order* provide adequate guidance for the arbitration process.[510] Therefore, the Commission will suspend action on a complaint where both parties agree to use ADR, including commercial arbitration, within 20 days following the close of the pleading cycle. Parties may agree that voluntary arbitration is a quick and productive way to resolve their commercial disputes. Moreover, we will continue to monitor developments in the marketplace and will, if necessary, revisit in the future whether to adopt a mandatory arbitration requirement.

IV. NOTICE OF PROPOSED RULEMAKING

A. Procedure for Shortening Term of Extension of Exclusive Contract Prohibition

114. In light of the five-year extension of the exclusivity ban, the Commission seeks comment on whether it can establish a procedure that would shorten the term of the extension if, after two years (*i.e.*, October 5, 2009) a cable operator can show competition from new entrant MVPDs has reached a certain penetration level in the DMA. We seek comment on what this penetration level should be. And, we seek comment on whether two years or some other time frame is the appropriate period of time. Finally, we ask parties to comment on whether a market-by-market analysis is appropriate as both a legal and policy matter.

B. Extending Program Access Rules to Terrestrially Delivered Cable-Affiliated Programming

115. In comments on the *NPRM*, competitive MVPDs provided various examples of withholding of terrestrially delivered cable-affiliated programming.[511] Moreover, in the *Order*, we note the Commission's previous findings that in two instances – Philadelphia and San Diego – withholding of terrestrially delivered cable-affiliated programming has had a material adverse impact on competition in

[508] *See id.*

[509] *See* 47 C.F.R. § 76.7(g)(2). Section 572(a) of the Administrative Dispute Resolution Act ("ADRA") provides that "[a]n agency may use a dispute resolution proceeding for the resolution of an issue in controversy that relates to an administrative program, if the parties agree to such proceeding." 5 U.S.C. § 572(a). Section 575(a)(1) authorizes the use of arbitration as an alternative means of dispute resolution "whenever all parties consent." 5 U.S.C. § 575(a)(1).

[510] *See Adelphia Order*, 21 FCC Rcd at 8836, Appendix B, and 8340, Appendix C.

[511] *See supra* ¶ 49.

the video distribution market.[512] As discussed in the *Order*, however, the Commission has previously concluded that terrestrially delivered programming is "outside of the direct coverage" of the exclusive contract prohibition in Section 628(c)(2)(D).[513] In the *Order*, we state our continued view that the plain language of the definitions of "satellite cable programming" and "satellite broadcast programming" as well as the legislative history of the 1992 Cable Act place terrestrially delivered programming beyond the scope of Section 628(c)(2)(D).[514] Commenters, however, cite various other provisions of the Communications Act as providing the Commission with statutory authority to extend the program access rules, including an exclusive contract prohibition, to terrestrially delivered cable-affiliated programming, such as Sections 4(i), 201(b), 303(r), 601(6), 612(g), 616(a), 628(b), and 706.[515]

116. As demonstrated by the examples of withholding of RSNs in San Diego and Philadelphia, we believe that withholding of terrestrially delivered cable-affiliated programming is a significant concern that can adversely impact competition in the video distribution market. To address this concern, we seek comment on whether it would be appropriate to extend our program access rules to all terrestrially delivered cable-affiliated programming pursuant to Sections 4(i), 201(b), 303(r), 601(6), 612(g), 616(a), 628(b), or 706, or any other provision under the Communications Act.[516] In particular, we note our previous conclusion that the ability to offer a viable video service is "linked intrinsically" to broadband

[512] *See id.*

[513] *See supra* ¶ 78.

[514] *See id.*

[515] *See* SureWest Comments at 7-8 (citing Section 4(i) of the Communications Act); Verizon Comments at 14 (same); *id.* at 14 (citing Section 303(r) of the Communications Act); SureWest Comments at 8 (citing Section 601(6) of the Communications Act); RICA Comments at 5 (citing Section 612(g) of the Communications Act); *id.* at 5 (citing Section 616(a) of the Communications Act); SureWest Comments at 7 (citing Section 628(b) of the Communications Act); *see also* AT&T Comments at 9 n.24; BSPA Comments at 16-18; EchoStar Comments at 4.

[516] *See* 47 U.S.C. § 154(i) ("The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions."); 47 U.S.C. § 201(b) ("The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter."); 47 U.S.C. § 303(r) ("The Commission from time to time, as public convenience, interest, or necessity requires, shall . . . (r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter . . . ."); 47 U.S.C. § 521(6) (stating that one of the purposes of Title VI (Cable Communications) of the Communications Act is to "promote competition in cable communications . . . ."); 47 U.S.C. § 532(g) (stating that when "cable systems with 36 or more activated channels are available to 70 percent of households within the United States and are subscribed to by 70 percent of the households to which such systems are available, the Commission may promulgate any additional rules necessary to provide diversity of information sources"); 47 U.S.C. § 536(a) (stating that the "Commission shall establish regulations governing program carriage agreements and related practices between cable operators or other multichannel video programming distributors and video programming vendors"); 47 U.S.C. § 548(b) ("It shall be unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers."); 47 U.S.C. § 157 nt. (stating that the Commission "shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity, . . . measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment").

deployment.[517] We seek comment on whether the ability to offer terrestrially delivered cable-affiliated programming is needed to offer a viable video service and, accordingly, whether extending the program access rules, including the prohibition on exclusive contracts, to terrestrially delivered cable-affiliated programming would promote the goal of Section 706 to facilitate broadband deployment. In addition, we note that the plain language of Section 628(b), like Section 628(c)(2)(D), specifies "satellite cable programming" and "satellite broadcast programming."[518] We seek comment regarding whether we have the authority to extend our program access rules to all terrestrially delivered cable-affiliated programming by way of statutory provisions granting general authority to the Commission, in light of the specific authority in Section 628 that limits their scope to satellite programming.

117. We also seek comment on the extent to which cable operators are shifting delivery of affiliated programming from satellite delivery to terrestrial delivery and whether such action is intended to evade the program access rules. We note Verizon's claim that Cablevision's programming subsidiary, Rainbow, has made standard definition feeds of its RSNs available by satellite, but HD feeds available terrestrially, thereby avoiding the program access rules, including the exclusive contract prohibition, for HD feeds.[519] We seek comment on whether the program access rules should apply to all feeds of the same programming, including both standard and HD feeds, regardless of whether one feed is delivered terrestrially. We also seek comment on whether shifting the HD feed of vertically integrated cable programming to terrestrial delivery is an unfair method of competition or an unfair or deceptive act in violation of Section 628(b) of the Communications Act.[520]

C. Expanding the Exclusive Contract Prohibition to Non-Cable-Affiliated Programming

118. We also seek comment on whether to expand the exclusive contract prohibition to apply to non-cable-affiliated programming that is affiliated with a different MVPD, principally a DBS provider. As discussed above, to the extent that an MVPD meets the definition of a "cable operator" under the Communications Act, the exclusive contract prohibition in Section 628(c)(2)(D) already applies to its affiliated programming.[521] Moreover, as noted above, Section 628(j) of the Communications Act provides that any provision of Section 628, including the exclusive contract prohibition in Section 628(c)(2)(D), that applies to a cable operator also applies to any common carrier or its affiliate that provides video programming.[522] Programming affiliated with other MVPDs, such as DBS providers, is beyond the scope of the exclusive contract prohibition in Section 628(c)(2)(D). We seek comment on

[517] *See Local Franchising Report and Order*, 22 FCC Rcd at 5132-33, ¶ 62 ("The record here indicates that a provider's ability to offer video service and to deploy broadband networks are linked intrinsically, and the federal goals of enhanced cable competition and rapid broadband deployment are interrelated.") (footnote omitted).

[518] *See* 47 U.S.C. §§ 548(b); 548(c)(2)(D).

[519] *See* Verizon Comments at 13-14; Verizon Reply Comments at 5.

[520] 47 U.S.C.§ 548(b). The Commission has stated "there may be circumstances where moving programming from satellite to terrestrial delivery could be cognizable under Section 628(b) as an unfair method of competition or deceptive practice if it precluded competitive MVPDs from providing satellite cable programming." *See RCN Telecom Services v. Cablevision Systems Corp.*, 16 FCC Rcd 12048, 12053, ¶ 15; *DIRECTV*, 15 FCC Rcd at 22807; *Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems*, 11 FCC Rcd 18223, 18325, ¶ 197 n.451 (1996) ("we do not foreclose a challenge under Section 628(b) to conduct that involves moving satellite delivered programming to terrestrial distribution in order to evade application of the program access rules and having to deal with competing MVPDs").

[521] *See supra* ¶ 76.

[522] *See supra* note 377; *see also* 47 U.S.C. § 548(j).

whether to extend the exclusive contract prohibition to non-cable-affiliated programming that is affiliated with a different MVPD, principally a DBS provider, pursuant to Sections 4(i), 201(b), 303(r), 601(6), 612(g), 616(a), 628(b), or 706, or any other provision under the Communications Act.[523]

D. Tying of Desired Programming with Undesired Programming

119. Small and rural cable operators and other MVPDs have raised concerns regarding tying of MVPDs' rights to carry broadcast stations with carriage of other owned or affiliated broadcast stations in the same or a distant market or one or more affiliated non-broadcast network.[524] For example, in 2002, the American Cable Association ("ACA"), representing small cable operators, filed a Petition for Inquiry stating that broadcast networks and station groups engage in unfair retransmission tying arrangements.[525] ACA explains that tying harms small cable operators and their consumers by increasing the costs of basic cable and reducing program choices.[526] Small and rural cable operators and other MVPDs, in addition to recent program access complainants, have also raised concerns regarding the practice of programmers to tie marquee programming, such as premium channels or regional sports programming, with unwanted, or less desirable, programming.[527] For example, in their comments on the *Notice*, OPASTCO/ITAA, representing small and rural MVPDs, cites the practice of programmers to require carriage of less popular programming in specified (usually basic) tiers in return for the right to carry popular programming as an onerous and unreasonable condition that denies consumers choice and impedes entry into the MVPD market.[528]

120. When programming is available for purchase only through programmer-controlled packages that include both desired and undesired programming, MVPDs face two choices. First, the MVPD can refuse the tying arrangement, thereby potentially depriving itself of desired, and often economically vital, programming that subscribers demand and which may be essential to attracting and retaining subscribers. Second, the MVPD can agree to the tying arrangement, thereby incurring costs for programming that its subscribers do not demand and may not want, with such costs being passed on to subscribers in the form of higher rates, and also forcing the MVPD to allocate channel capacity for the unwanted programming in place of programming that its subscribers prefer.[529] In either case, the MVPD and its subscribers are harmed by the refusal of the programmer to offer each of its programming services on a stand-alone basis. We note that the competitive harm and adverse impact on consumers would be the same regardless of whether the programmer is affiliated with a cable operator or a broadcaster or is affiliated with neither a cable operator nor a broadcaster, such as networks affiliated with a non-cable MVPD or a non-affiliated independent network. Moreover, we note that small cable operators and MVPDs are particularly vulnerable to such tying arrangements because they do not have leverage in negotiations for programming due to their smaller subscriber bases.[530] As discussed in more detail below,

[523] *See supra* n. 516.

[524] *See supra* ¶ 82.

[525] American Cable Association's Petition for Inquiry into Retransmission Consent Practices (filed October 1, 2002) ("*ACA 2002 Petition*").

[526] *See id.* at 2, 18.

[527] *EchoStar Satellite L.L.C. v. Home Box Office, Inc.*, CSR 7070-P, filed November 15, 2006, dismissed at the request of the parties on February 5, 2007, DA 07-2661.

[528] *See* OPASTCO/ITTA Comments at 5-8.

[529] *See ACA 2002 Petition* at 2 ("Due to limited capacity of smaller cable systems, tying arrangements restrict the ability of those systems to carry additional services.").

[530] *See* NTCA Comments at 8.

we seek comment on these various types of tying arrangements. Given the problems associated with such tying arrangements, we seek comment on whether it may be appropriate for the Commission to preclude them. We also seek comment on the extent to which these disparities in bargaining power are the result of media consolidation, and, if so, what steps the Commission can and should take to redress the imbalance.

121. *Tying of Broadcast Programming.* We seek comment on the tying of MVPDs' rights to carry broadcast stations with carriage of other owned or affiliated broadcast stations in the same or a distant market or one or more affiliated non-broadcast networks. Section 325(b)(3)(C) of the Communications Act obligates broadcasters and multichannel video programming distributors to negotiate retransmission consent agreements in good faith.[531] Specifically, the Commission must establish regulations that:

> until January 1, 2010, prohibit a television broadcast station that provides retransmission consent from engaging in exclusive contracts for carriage or failing to negotiate in good faith, and it shall not be a failure to negotiate in good faith if the television broadcast station enters into retransmission consent agreements containing different terms and conditions, including price terms, with different multichannel video programming distributors if such different terms and conditions are based on competitive marketplace considerations.[532]

122. In its *Good Faith Order*, the Commission adopted rules implementing the good faith negotiation provisions and the complaint procedures for alleged rule violations.[533] The *Good Faith Order* adopted a two-part test for good faith.[534] The first part of the test consists of a brief, objective list of negotiations standards.[535] The second part of the good faith test is based on a totality of the circumstances standard.[536]

---

[531] 47 U.S.C. § 325(b)(3)(C).

[532] 47 U.S.C. § 325(b)(3)(C)(ii). Pursuant to the Satellite Home Viewer Extension and Reauthorization Act of 2004 ("SHVERA"), Congress extended 47 U.S.C. § 325(b)(3)(C) until 2010 and amended that section to impose a reciprocal good faith retransmission consent bargaining obligation on MVPDs. The Commission adopted rules implementing Section 207 of SHVERA. *See In the Matter of: Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004: Reciprocal Bargaining Obligation*, 20 FCC Rcd 10339 (2005). ("*Reciprocal Bargaining Order*").

[533] *Implementation of the Satellite Home Viewer Improvement Act of 1999: Retransmission Consent Issues*, 15 FCC Rcd 5445 (2000) ("*Good Faith Order*"), *recon. granted in part*, 16 FCC Rcd 15599 (2001).

[534] *Good Faith Order*, 15 FCC Rcd at 5457.

[535] *Id.* at 5462-64. First, a broadcaster may not refuse to negotiate with an MVPD regarding retransmission consent. Second, a broadcaster must appoint a negotiating representative with authority to bargain on retransmission consent issues. Third, a broadcaster must agree to meet at reasonable times and locations and cannot act in a manner that would unduly delay the course of negotiations. Fourth, a broadcaster may not put forth a single, unilateral proposal. Fifth, a broadcaster, in responding to an offer proposed by an MVPD, must provide considered reasons for rejecting any aspects of the MVPD's offer. Sixth, a broadcaster is prohibited from entering into an agreement with any party conditioned upon denying retransmission consent to any MVPD. Finally, a broadcaster must agree to execute a written retransmission consent agreement that sets forth the full agreement between the broadcaster and the MVPD. *Id.*; *see* 47 C.F.R. § 76.65(b)(1)(i)-(vii).

[536] *Good Faith Order*, 15 FCC Rcd at 5458; 47 C.F.R. § 76.65(b)(2).

123. The Commission has held that "[r]efusal by a Negotiating Entity to put forth more than a single, unilateral proposal" is a *per se* violation of a broadcast licensee's good faith obligation.[537] The Commission has also indicated that such requirement is not limited to monetary considerations, but also applies to situations where a broadcaster is unyielding in its insistence upon carriage of a secondary programming service undesired by the cable operator as a condition of granting its retransmission consent:

> "Take it, or leave it" bargaining is not consistent with an affirmative obligation to negotiate in good faith. For example, a broadcaster might initially propose that, in exchange for carriage of its signal, an MVPD carry a cable channel owned by, or affiliated with, the broadcaster. The MVPD might reject such offer on the reasonable grounds that it has no vacant channel capacity and request to compensate the broadcaster in some other way. Good faith negotiation requires that the broadcaster at least consider some form of consideration other than carriage of affiliated programming. This standard does not, in any way, require a broadcaster to reduce the amount of consideration it desires for carriage of its signal. This standard only requires that the broadcaster be open to discussing more than one form of consideration in seeking compensation for retransmission of its signal by MVPDs.[538]

124. As discussed above, ACA in 2002 filed a Petition for Inquiry regarding the Commission's retransmission consent rules.[539] ACA's Petition raises concerns about broadcasters' alleged abuse of the retransmission consent process.[540] ACA asserts that broadcast networks and station groups engage in unfair retransmission tying arrangements. ACA asserts that small cable operators have minimal bargaining power during negotiations and are targets for abuse because of their lack of resources to file complaints and engage in disputes.

---

[537] 47 C.F.R. § 76.65(b)(1)(iv).

[538] *Good Faith Order*, 15 FCC Rcd at 5463, ¶ 43.

[539] American Cable Association's Petition for Inquiry into Retransmission Consent Practices (filed October 1, 2002). This petition will be placed in the record of this proceeding. ACA also filed a "Petition for Rulemaking to Amend 47 CFR §§ 76.64,76.93 and 76.103" on March 2, 2005, which asserted that competition and consumers are harmed when broadcasters use exclusivity and network affiliate agreements to extract "supracomepetitive prices" for retransmission consent from small cable companies. *See Public Notice*, Report No. 2696, RM-11203 (March 17, 2005).

[540] We note that that in its *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004* (September 8, 2005) (available at http://www.fcc.gov/mb/policy/shvera.html), the Commission addressed the tying issue. The Commission noted "cable operators' widespread concern that retransmission consent negotiations frequently involve broadcasters tying carriage of their signals to numerous affiliated non-broadcast programming networks." *Id.* at 25. The Report noted that "since the Commission's decision to deny broadcasters the ability to assert dual and multicast must carry, broadcasters have begun using their retransmission consent negotiations to negotiate carriage of their digital signals, thus furthering the digital transition by increasing the number of households with access to digital signals. If broadcasters are limited in their ability to accept in-kind compensation, they should be granted full carriage rights for digital signals, including all free over-the-air digital multicast streams. Should Congress consider proposals circumscribing retransmission consent compensation, we encouraged review of related rules and policies to maintain proper balance." *Id.*

125. We seek comment on the current status of carriage negotiations in today's marketplace. We seek comment on whether broadcasters are tying carriage of their broadcast signals to carriage of other owned or affiliated broadcast stations in the same or a distant market or one or more affiliated non-broadcast networks and, if so, how retransmission consent negotiations are impacted. We ask if broadcast networks and station groups engage in retransmission consent tying arrangements that result in harm to small cable operators and their customers. We ask if the Commission's good faith negotiation regulations provide enough protection for small cable operators and small broadcasters in the negotiation process, taking into account the administrative burdens and costs of engaging in a contested case before the Commission. We seek comment on whether and how the Commission's good faith negotiation regulations should be modified to address these concerns. Also, we ask what the effect of any modifications would be on the economic underpinnings of broadcast-affiliated programmers.

126. We also seek comment on whether the Commission has the jurisdiction to preclude tying arrangements by broadcasters, without modification of the retransmission consent regime by Congress. The legislative history of Section 325 addresses the right of broadcasters to seek carriage of additional channels as part of retransmission consent transactions: "Other broadcasters may not seek monetary compensation, but instead negotiate other issues with cable systems, such as joint marketing efforts, the opportunity to provide news inserts on cable channels, or the right to program an additional channel on a cable system. It is the Committee's intention to establish a marketplace for the disposition of the rights to retransmit broadcast signals; it is not the Committee's intention in this bill to dictate the outcome of the ensuing marketplace negotiations."[541] Congress appeared to contemplate carriage of broadcast-affiliated cable channels as part of legitimate retransmission consent negotiations.

127. In addition, we seek comment regarding whether there are grounds for the Commission to depart from prior holdings that permitted broadcasters to negotiate the carriage of affiliated channels as part of retransmission consent negotiations. The Commission has stated that examples of bargaining proposals "presumptively... consistent with competitive marketplace considerations and the good faith negotiation requirement" include "proposals for carriage conditioned on carriage of any other programming, such as a broadcaster's digital signals, an affiliated cable programming service, or another broadcast station either in the same or a different market."[542] We held that such a proposal contains "presumptively legitimate terms and conditions or forms of consideration" and found nothing to suggest that such a request is "impermissible" or anything "other than a competitive marketplace consideration."[543] In 2001, the Commission considered but refused to adopt rules specifically prohibiting tying arrangements.[544] The Commission concluded that such arrangements are permitted, but stated it would continue to monitor the situation with respect to potential anticompetitive conduct by broadcasters. We seek comment on whether market circumstances and industry practices have changed to warrant a different conclusion.

128. Lastly, we ask whether Commission action to preclude tying arrangements is consistent with the First Amendment. On the one hand, it could be argued that restricting such arrangements infringes the right of broadcasters to express a message by packaging together certain content. On the other hand, we note that the Supreme Court has observed that "the programming offered on various

[541] S.Rep. No. 102-92, at 35-36 (1991), accompanying S.12, 102nd Cong. (1991).

[542] *Implementation of the Satellite Home View Improvement Act of 1999; Retransmission Consent Issues, Good Faith Negotiation and Exclusivity*, 15 FCC Rcd 5445, 5469 (2000).

[543] *Id.*

[544] *Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission's Rules, Implementation of the Satellite Home View Improvement Act of 1999*, 16 FCC Rcd 2598, 2613 (2001).

channels" by video distributors consists of "individual, unrelated segments that happen to be transmitted together for individual selection by members of the audience."[545] Unlike newspapers and magazines, the Court suggested that these segments do not "contribute something to a common theme" expressed by the distributor to its subscribers.[546]

129. *Tying of Satellite Cable Programming.* Small and rural MVPDs as well as program access complainants have asserted that tying practices by satellite cable programmers constitute "unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any [MVPD] from providing satellite cable programming...to subscribers or consumers" in violation of Section 628(b) of the Communications Act.[547] At the time of the *First Report and Order*, the Commission declined to adopt specific rules under Section 628(b) to address tying, while clearly reserving the right to do so if necessary:

> Neither the record of this proceeding nor the legislative history offer much insight into the types of practices that might constitute a violation of the statute with respect to the unspecified "unfair practices" prohibited by Section 628(b).... The objectives of the provision, however, are clearly to provide a mechanism for addressing those types of conduct, primarily associated with horizontal and vertical concentration within the cable and satellite cable programming field, that inhibit the development of multichannel video distribution competition.
>
> * * * * *
>
> Thus, although the types of conduct more specifically referenced in the statute, *i.e.*, exclusive contracting, undue influence among affiliates, and discriminatory sales practices, appear to be the primary areas of congressional concern, Section 628(b) is a clear repository of Commission jurisdiction to adopt additional rules or to take additional actions to accomplish the statutory objectives should additional types of conduct emerge as barriers to competition and obstacles to broader distribution of satellite cable...programming.[548]

130. We seek comment on the current status of carriage negotiations in today's marketplace. We seek comment on whether satellite cable programmers are tying carriage of their desirable channels to carriage of other less desirable owned or affiliated channels. We ask whether and how such tying arrangements affect small cable operators and their customers. We seek comment on whether "take-it-or-leave-it" tying arrangements (*i.e.*, where the purchase of desired programming is conditioned on the purchase of undesired programming) without any alternative offer to provide the programming on a stand-alone basis are prevalent in the industry; and if so, whether such an arrangement is a violation of Section 628(b). As discussed above, in such situations, MVPDs are victims of an unfair method of competition that hinders significantly or prevents MVPDs from providing satellite cable programming to subscribers.

131. We also seek comment on whether the Commission has the jurisdiction to preclude tying arrangements by satellite cable programmers under Section 628(b) or any other statutory authority. We

---

[545] *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 576 (1995).

[546] *Id.*

[547] 47 U.S.C.§ 548(b).

[548] *First Report and Order*, 8 FCC Rcd at 3373.

seek comment on whether Section 628(b) requires satellite cable programmers to offer each of their programming services on a stand-alone basis to all MVPDs at reasonable rates, terms, and conditions. Moreover, to the extent that we decide in this proceeding to extend the Commission's program access rules to terrestrially delivered cable-affiliated programming networks, we seek comment on whether we should also require terrestrially delivered cable-affiliated programming networks to be offered on a stand-alone basis to all MVPDs at reasonable rates, terms, and conditions. Lastly, we ask whether Commission action to preclude tying arrangements by satellite cable programmers is consistent with the First Amendment.

132. *Tying of Other Programming.* We also seek comment on whether we have the jurisdiction or authority to require networks that are affiliated with neither a cable operator nor a broadcaster, such as networks affiliated with a non-cable MVPD or a non-affiliated independent network, to be offered on a stand-alone basis to all MVPDs at reasonable rates, terms, and conditions. We seek comment on the extent to which such programming networks have engaged in unfair tying practices or other abusive practices that would require regulatory intervention. We seek comment on whether it would be appropriate to regulate these programming networks in such a manner pursuant to Sections 4(i), 201(b), 303(r), 601(6), 612(g), 616(a), and 706, or any other provision under the Communications Act.

E. Program Access Concerns Raised by Small and Rural MVPDs

133. As discussed above, small and rural MVPDs raise additional issues in their comments regarding obstacles they face in trying to obtain access to programming.[549] They ask the Commission to examine various conditions they describe as onerous and unreasonable, which they allege are imposed by programmers on small and rural MVPDs for access to content, including restrictions on the use of shared headends for receiving content.[550] NTCA and OPASTCO/ITTA claim that use of a shared headend is an economical means for multiple rural MVPDs to provide video service in a high-cost area, but that programmers have expressed concern with the potential for the use of shared headends to result in unauthorized reception of programming.[551] NTCA states that while shared headend providers are currently negotiating with content providers to resolve these issues, it is concerned that rural consumers served by shared headends may lose access to programming if these negotiations fail.[552] In addition to the issue of shared headends, small and rural MVPDs ask the Commission to examine other conditions imposed by programmers, including (i) requiring MVPDs to enter into mandatory non-disclosure agreements with programmers, which prevents small and rural MVPDs from obtaining information about

[549] *See* NTCA Comments at 6-8; OPASTCO/ITTA Comments at 5-8.

[550] *See* NTCA Comments at 6-7; OPASTCO/ITTA Comments at 8.

[551] *See* NTCA Comments at 7 ("Some small video providers serve less than 300 residents within their service areas. If many small rural video providers were required to invest approximately $1 to $3 million in a head-end, manage and maintain the network and absorb the programming costs, they could never expect to recover their investment nor provide affordable/competitive video services throughout their service areas.").

[552] *See id.* at 7; OPASTCO/ITTA at 8 (asking the Commission to establish that the use of shared headends may not serve as an excuse for programmers to impose inordinately high rates or unwarranted encryption restrictions beyond those necessary for a reasonable degree of protection). In response to these concerns, NCTA and Comcast argue that the issue of restrictions on the use of shared headends is not within the Commission's authority under Section 628 and that the use of shared headends raises a security issue that is relevant to all programming networks, regardless of whether the programming network is affiliated with a cable operator. *See* NCTA Reply Comments at 14-15; Comcast Reply Comments at 31-32.

the market value of programming;[553] (ii) requiring small and rural MVPDs to provide programmers with "hundreds of advertising slots";[554] and (iii) mandating unwarranted security requirements that extend beyond the legitimate need to protect programming.[555] OPASTCO/ITTA claim that all of these conditions impede the entry of small and rural telephone companies into the video distribution marketplace. We seek comment on the extent to which such practices are occurring in the marketplace and, if so, whether we should, and whether we have the authority to, take action to address these practices.

F. Modification of Program Access Complaint Procedures

134. *Remedies for Violations.* We seek comment on whether to add an arbitration-type step as part of the Commission's determination of an appropriate remedy for program access violations. We agree with commenters that commercial arbitration requires parties to put forth their best effort to resolve disputes or risk the arbitrator adopting the opposing parties' proposals.[556] This type of pressure can encourage the parties to resolve their differences through settlement. We believe that a modified version of this method can encourage negotiation among the parties. Therefore, we seek comment on whether, when feasible, the Commission should request, as part of its evaluation of the appropriate remedy to impose for program access violations, that the parties each submit their best "final offer" proposal for the rates, terms, or conditions under review. We seek comment on whether the Commission should have the discretion to adopt one of the parties' proposals as the remedy for the program access complaint.

135. *Status of Existing Contract Pending Resolution of Program Access Complaint.* While we decline to adopt mandatory arbitration in lieu of the Commission's complaint process in the *Order*, we issue this *NPRM* on the issue of a provision for complainants to request a stay of any action or proposed action that would change an existing program contract that is the subject of a program access complaint, pending the resolution of the program access complaint. Some competitive providers recommend a "standstill" requirement for pre-existing carriage contracts during adjudication of program access disputes, to preserve the *status quo* until the program access complaint has been resolved.[557] In a recent merger transaction, in adopting conditions for arbitration of program access disputes, the Commission required that an aggrieved MVPD have continued access to the programming in question under the terms and conditions of the expired contract, pending resolution of the dispute.[558] Verizon supports a five-month long standstill provision while complaints are being resolved. BSPA, RCN, and USTelecom support a standstill provision pending the resolution of the complaint, wherein carriage is continued and the parties are subject to the same price, terms, and conditions of the existing contract, with any new price

[553] *See* OPASTCO/ITTA Comments at 6; *see also* Comments of OPASTCO, MB Docket No. 06-189 (December 29, 2006), at 12.

[554] *See* OPASTCO/ITTA Comments at 6.

[555] *See id.*

[556] *See* Echostar Comments at n. 36; BSPA Comments at n. 16 (*citing Hughes Order*, 19 FCC Rcd 473, 552, ¶ 174 and n.490, which concluded that final offer arbitration has the attractive "ability to induce two sides to reach their own agreement, lest they risk the possibility that a relatively extreme offer of the other side may be selected by the arbitrator" (*citing* Steven J. Brams, *Negotiation Games: Applying Game Theory to Negotiation and Arbitration*, Routledge, 2003 at 264)).

[557] *See* BSPA Comment at 7; Verizon Comments at 16-17; BSPA Reply Comments at 15.

[558] *See Adelphia Order*, 21 FCC Rcd at 8337, Appendix B, § B(2)(c). Provision of the disputed programming during the pendency of arbitration was not required in the case of the first time requests for programming where no carriage agreement had previously existed between the parties. *See id.*, Appendix B, § B(2)(d).